## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: January 17, 2002

TO : Dorothy L. Moore-Duncan, Regional Director

Daniel E. Halevy, Regional Attorney

John D. Breese, Assistant to Regional Director

Region 4

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Deborah Heart and Lung Center

Case 4-CA-30363 512-5012-8300

512-5012-8301 512-5012-8320 512-5072-3900

This case was submitted for advice on whether the Employer violated Section 8(a)(1) by discriminatorily denying non-employee Union representatives access to its premises. We concluded that the Employer violated Section 8(a)(1) because it discriminatorily denied the Union access to its premises.

## FACTS

The Deborah Heart and Lung Center (the Employer) is a non-profit charitable organization specializing in diagnosing and treating all forms of cardiac, vascular and pulmonary diseases in adults, and congenital and acquired heart disease defects in neonates and children. The Employer employs between 500 to 600 nonprofessional and service employees.

The Employer maintains a no-solicitation policy that states in pertinent part:

- 2. Non-employees are not permitted to solicit, post announcements or distribute material on Center premises at any time except in the limited cases where there is Administrative authorization regarding employee fringe benefits and employee discounts, in the case of vendors who are requested to present information relating to potential Center purchases, or in conjunction with Foundation-sponsored fundraising activities.
- 3. Employees may not solicit or be solicited on working time for any purpose. Employees may not

solicit or distribute materials on non-working time in public or work/patient areas such as the lobbies, patient rooms, operating rooms, corridors outside patient rooms, patient or visitor waiting areas or areas where patients receive treatment. As there are truly no 'public' areas in the hospital, employees may solicit and be solicited by other employees while both are on non-working time in the Employee Cafeteria.

10. There shall be no posting, distribution or solicitation by or on behalf of outside organizations unless sponsored by or benefiting Deborah, and approved in advance by Administration or Human Resources.

In October 2000, the United Food and Commercial Workers Union, Local 1360 (the Union) began an organizing campaign in an effort to organize the Employer's nonprofessional and service employees. In January 2001, the Union began soliciting support and distributing literature to interested employees on the Employer's property. Several union representatives carried out these activities in the Employer's parking lot, at the smoking area near the employee entrance to the building and in the Employer's cafeteria during lunchtime. During March and April, the Union had at least one representative present at the Employer's facility daily, and two others would join him several times a week.

On March 15, the Employer sent the Union a letter stating that although it had allowed the Union on its property up until that point, it would begin expelling any Union representative discovered on its property. The Employer explained that it had received complaints from employees regarding the Union's organizing tactics, such as the holding of public meetings in the community and the visiting of employees at their homes.

Around May 15, a Union representative was having lunch in the Employer's cafeteria when a security guard asked him to leave. The head of security stated that if Union representatives returned to the Employer's property they would be arrested. On May 17, two other Union representatives, who were sitting at the Employer's outdoor smoking area were escorted off the property by the Employer's security.

 $<sup>^{1}</sup>$  All dates hereafter are in 2001, unless otherwise indicated.

In a letter to the Union dated May 24, the Employer acknowledged that it had permitted the Union representatives on its property since October 2000, but stated that such access had been granted with the understanding that the Union representatives would not harass or intimidate the employees. The Union denies that it harassed or intimidated employees and contends that its representatives only spoke to employees that approached them and expressed an interest in the Union. The Region requested evidence from the Employer regarding the alleged harassment and intimidation. The Employer failed to produce any such evidence.

During the month before the Union was removed from the Employer's property, Union representatives observed solicitation by various other organizations on the Employer's property. The solicitors included representatives from Lincoln Financial Group, AIM Funds, Putnam College Advantage, Atlantic Pension Planning Corporation, Cingular Wireless and Verizon Wireless. The Union also observed brochures for a sidewalk sale.

The Employer does not dispute the presence of these other groups on its property. The Employer explains that the sidewalk sale was conducted to raise funds for the Employer's hospital, a not-for-profit charitable organization. Lincoln Financial Group, AIM Funds, Putnam College Advantage, and Atlantic Pension Planning Corporation each served as a broker for benefits currently offered by the Employer to its employees. As to the wireless phone companies, the Employer grants access to Verizon and Cinqular four times a year for five hours each visit to offer discounts on cellular phone service to the Employer's employees.<sup>2</sup> The offers by Verizon result from the Employer's participation in a group-purchasing contract with Verizon for cellular service. The Employer asserts that an aspect of its participation in the group-purchasing contract with Verizon is that it creates a savings opportunity for its employees. The discounts offered by Verizon are not available to the general public and can only be obtained as an employee of the Employer. Employer invites Cinqular Wireless on the premises to solicit simultaneously with Verizon to "insure a competitive environment."

## ACTION

 $<sup>^{2}\ \</sup>mbox{The discounts pertain to cellular service for the employees' personal use.$ 

We conclude that the Employer violated Section 8(a)(1) by discriminatorily denying the Union access to its premises.

It is well settled that an employer "cannot be compelled to allow distribution of union literature by non-employee organizers on his property." Lechmere, Inc. v. NLRB, 502 U.S. 527, 533 (1992). An employer may refuse to do so as long as it "does not discriminate against the union by allowing other distribution." NLRB v. Babcock & Wilcox, 351 U.S. 105, 112 (1956). "Reasonable restrictions upon solicitation are not per se invalid because [they are] imposed during an organizational campaign . . . A new rule or tightened enforcement [of a] policy will, however, be invalid if imposed with 'discriminatory intent'."  $^3$ 

Under these principles, the Employer could have lawfully excluded the Union from its property. However, there is evidence that the Employer's denial of access to the Union was discriminatorily motivated. The Employer's discriminatory motive is reflected in its stricter enforcement of the no-solicitation rule against the Union after March. Here, the Employer permitted the Union to solicit employees on its property for several months before it ejected them in March. The only explanation for the Employer's tightened enforcement in March is that employees were complaining about the Union's organizing tactics, such as home visits and public community meetings. These are legitimate and protected union organizing activities which the Employer may not lawfully restrain.<sup>4</sup> The Employer's statement that it tightened enforcement of its nosolicitation rule in response to the Union's organizing campaign is an admission that it denied access to the Union in order to restrain Section 7 conduct. This is direct

<sup>3</sup> NLRB v. McCullough Environmental Services, Inc., 5 F.3d 923, 391 (5th Cir. 1993) citing NLRB v. Roney Plaza Apts., 597 F.2d 1046, 1049 (5th Cir. 1979).

<sup>&</sup>lt;sup>4</sup> General Electric Co., 255 NLRB 673, 676, 679 (1981) (union meeting at hotel is protected employee union activity; surveillance of such activity is a violation of 8(a)(1)); (request to visit employees' homes is protected by the Act, citing NLRB v. Babcock and Wilcox Co., 351 U.S. 105, 113 (1956)). The Employer has presented no evidence that the Union engaged in harassment, intimidation or other coercive conduct that would render its solicitation of employees unprotected.

evidence of the Employer's discriminatory application of its no-solicitation rule.

The Employer's discriminatory motive toward the Union is further demonstrated by the Employer's granting of access to others who sought to solicit on its premises while denying the Union access. Discrimination against a union occurs when there is sufficient proof that an employer has allowed other individuals, groups and organizations to use its premises for various activities while denying access to the union. However, such disparate treatment is not discriminatory if an employer permits only a small number of isolated "beneficent acts" or the solicitation is work-related as an integral part of the employer's necessary functions and responsibilities. Such work-related solicitation may include activities regarding an employer's "regular benefit package," e.g., paid for in whole or in part by an employer for its employees.

Here, we must decide whether the solicitation by Verizon and Cingular falls within the business-related exception so that the Employer's grant of access to these entities would not amount to discrimination. 9 As noted

 $<sup>^{5}</sup>$  <u>Sandusky Mall Co.</u>, 329 NLRB 618, 620-621 (1999), enf. denied 242 F.3d 682(6<sup>th</sup> Cir. 2001).

<sup>6</sup> Lucile Salter Packard Children Hospital, 318 NLRB 433, 434
(1995), enfd. 97 F.3d 583 (D.C. Cir. 1996), citing Hammary
Mfg. Corp., 265 NLRB 57 fn. 4 (1982).

 $<sup>^7</sup>$  Id. at 433-434. See also Rochester General Hospital, 234 NLRB 253, 259 (1978).

<sup>8</sup> Lucile Salter Packard Children Hospital v. NLRB, 97 F.3d 583, 590 (1996) ("the Board drew a reasonable distinction between the solicitations regarding benefits paid for in whole or in part by the Hospital, which the ALJ found to be 'intimately related' to the Hospital's regular benefit package, and the solicitations at issue here, which involve products and services purchased out of the employees own pockets.").

<sup>&</sup>lt;sup>9</sup> We agree with the Region that the other solicitations that occurred on the Employer's property fall within the Board's exception for business related activities and are not evidence of disparate treatment.

above, the solicitations are business-related if they are either (1) an integral part of the Employer's business, or (2) part of the Employer's "regular benefits package." 10 The solicitations are not an integral part of the Employer's business, since there is no evidence to suggest that cellular phones are used by the employees to carry out their duties. Next, we must consider whether the solicitations qualify as activities that assist the Employer in providing the employees with its "regular benefit package."

We conclude that the employee discounts provided by Verizon and Cingular are not part of the Employer's regular benefit package. As to Verizon, we considered whether these discounts are part of the Employer's regular benefit package because the Employer's purchasing contract for its own services provides that Verizon will offer the employees a discount on wireless rates. These discounts are not available to the general public and can only be obtained by virtue of the employee's relationship with the Employer. Thus, the employees enjoy a benefit of a discount on cellular service, and this benefit is only available to them by virtue of their employment with the Employer.

However, there is no evidence that the Employer pays for this benefit, either in whole or in part. The Employer does not contend it provides any consideration for the lower rates for its employees, or that it receives a discount on its contractual rate in exchange for Verizon's opportunity to sign up the Employer's employees. In these circumstances, Verizon was offering no more than an employee discount. We conclude that an employee discount does not fit within the business-related exception. Since the Employer does not pay for this benefit, in whole or in part, it cannot be considered part of the regular benefit package.

The conclusion that Verizon's presence was merely the offer of an employee discount and should not be considered

There is no question that Verizon's and Cingular's solicitations would not qualify as beneficent acts.

<sup>11</sup> See <u>Dow Jones and Co., Inc.</u>, 318 NLRB 574, 588 (1995). See also <u>Lakeland Regional Medical Center</u>, Inc., Case 12-CA-18460, Advice Memorandum dated April 29,1997, at pp. 6-7.

<sup>12</sup> See <u>Lucile Salter Packard Children's Hospital</u>, 97 F.3d at 133.

part of an Employer's benefit package is reinforced by Cingular's presence on the property to solicit the employees. The Employer's only justification for permitting Cingular on its premises is to create a competitive environment. Cingular's solicitation was not based on any contractual relationship with the Employer and therefore would not possibly be considered part of the Employer's regular fringe benefit package.

Finally, we cannot say in these circumstances that the sparsity of Verizon's and Cingular's visits shows there was no discriminatory denial of access to the Union. The Board has never held that it considers isolated commercial acts, as opposed to isolated beneficent acts, removed from the consideration of discriminatory denial of access. Moreover, even if the Board considered that isolated commercial acts were not evidence of disparate treatment, the visits by Verizon and Cingular are not isolated. The Employer allowed Verizon and Cinqular to solicit employees on its property four times a year for five hours each visit. We consider these visits to have occurred on a regular and routine basis, and therefore are not isolated acts. 13 Moreover, under paragraph 2 of the Employer's nosolicitation policy, the Employer reserves the right to permit other solicitation regarding employee discounts, a facially discriminatory policy. 14 Thus, we conclude that the

13 See, e.g., Albertson's, 332 NLRB No. 104, slip op. at 4; Sandusky Mall Co., 329 NLRB at 621; Lucile Salter Packard Children's Hospital, 318 NLRB at 434; Be-Lo Stores, 318 NLRB 1, 10-11 (1995); Pay Less Drug Stores Northwest, 312 NLRB 972, 973-974 (1993), enf. denied 57 F.3d 1077 (9<sup>th</sup> Cir. 1995).

<sup>14</sup> In our view, paragraph 10 of the no-solicitation rule is illegal insofar as it reinforces the illegality of paragraph 2 of that rule. However, we do not view paragraph 10 as an unlawful restriction on employees' own Section 7 activities. It is not addressed to employees, while paragraph 3 of the rule speaks specifically to the rights of employees to solicit. We further view paragraph 3 as a valid no-solicitation rule directed at employees. Therefore, given that the Employer has not applied paragraph 10 to restrict the rights of employees more narrowly than paragraph 3, we view paragraph 10 as a restriction on non-employees similar to paragraph 2 of the rule.

Employer's practice with respect to access by Verizon and Cingular is not isolated.

Accordingly, absent settlement, the Region should issue complaint alleging that the Employer violated Section 8(a)(1) by discriminatorily denying the Union access to its property.

B.J.K.